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QUESTION OF THE HUMAN RIGHTS OF ALL PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

Written statement submitted by the American Association of Jurists, a non-governmental organization in consultative status (category II)

The Secretary-General has received the following written statement, which is circulated in accordance with Economic and Social Council resolution 1296 (XLIV).

[24 January 1994]

The Saavedra Marreros case

1. The Working Group on Arbitrary Detention, established in 1991, has made a considerable effort in the campaign against any form of arbitrary detention. Although the Group's report for 1993 (E/CN.4/1993/24) is very satisfactory as a whole, we should like to make a number of observations concerning some of its decisions, and in particular decision No. 7/1992 (Peru) (annex I), in which the detention of the complainant, the lawyer Wilfredo Saavedra Marreros, was declared not to be arbitrary.

2. Before analysing the Saavedra Marreros case, we would draw attention to decisions Nos. 9/1992, 14/1992 and 15/1992, which are in contradiction with other decisions in which the Group declared detention arbitrary notwithstanding certain gaps in the information provided by the State or by the author of the request. It would be as well, therefore, especially in view of the lack of information from the Government in question, to keep the case under review as far as possible, before taking a final decision. In doing otherwise the Working Group would run the risk of losing some of its effectiveness.

Detention without a warrant and without opportunity of recourse to a lawyer

3. Saavedra Marreros claims that he was detained without a warrant and without being able to consult his lawyer until 30 days after his arrest. The Group states in reply to him "... it is certain that although the police may have acted without a prior warrant, the person in question was brought before the court without there being any suggestion that this was done beyond the legal deadline (...), in view of which there appears to be no justification for the allegation of arbitrary detention" (E/CN.4/1993/24, annex I, decision No. 7/1992, para. 6 (g)). It may be argued that the Group at least has a duty to request information about the time that may have elapsed between arrest and the appearance of Saavedra Marreros before a court. It should not be forgotten, however, that the major treaty instruments for the protection of human rights (Peru is, moreover, a party to the International Covenant on Civil and Political Rights) have given rise to copious jurisprudence in this regard, and that the amount of time that elapses before a detained person is brought before a judge or other officer empowered to exercise judicial functions is germane to any ruling on the arbitrariness or otherwise of the detention.

4. It should be stressed that the accused reportedly had no access to counsel until 30 days after his arrest (para. 6 (a)). In this regard, the jurisprudence set forth in human rights instruments is quite clear: the benefit of the assistance of counsel is one of the basic procedural conditions for the effective exercise of the right of any detainee to be brought before a judge or other judicial officer. But the Group fails to mention an aggravating circumstance in the detention of Saavedra Marreros: he was arrested during the exercise of his profession as a lawyer, as reported by the Special Rapporteur on torture (E/CN.4/1990/17, para. 120).

Sentencing by a military court

5. The complainant also contested the competence of the military court which had sentenced him pursuant to anti-terrorist legislation. In analysing this complaint, the Group wrongly assimilates the notion of legality to that of the absence of arbitrariness.

6. Any State activity must be covered by statute and exercised accordingly. The principle of legality is involved here. In order not to be arbitrary, however, any domestic law relating to human rights must also conform to the international principles which govern the matter (advisory opinion of the Inter-American Court of Human Rights AO-13/43 of 16 July 1993). Consequently, the Group should not confine itself to stating that the military court's decision is not arbitrary because Peruvian anti-terrorist legislation recognizes that court's competence and the Supreme Court of Peru did not overturn the sentence. The Group, in so deciding, merely notes the respect for the principle of legality at the domestic level (had the latter been violated, the decision to arrest would have already been "illegal" and void at that stage, since it would have infringed domestic law). It fails to consider whether Saavedra Marreros was tried by an independent, impartial court in the absence of any arbitrariness, and whether Peruvian anti-terrorist legislation, in empowering the military courts to try civil offences, does not constitute a dangerous source of arbitrariness.

7. The Group itself envisages "having to look into domestic legislation so as to determine whether domestic law has been respected and, if so, whether this domestic law conforms to international standards. It may thus have to consider ... whether [the practice of arbitrary detention] is not made possible as a result of laws which may be in contradiction with international standards" (E/CN.4/1992/20, para. 10).

8. Military jurisdiction must be strictly limited to offences against military discipline. For any other offence, only the ordinary courts can provide the guarantee of impartiality and independence required for the proper administration of justice. This is the broadly dominant criterion at the international level (Declaration on the Protection of All Persons from Enforced Disappearance (General Assembly resolution 47/133); report of the Special Rapporteur on torture (E/CN.4/1990/17, para. 271); reports of the Working Group on Enforced or Involuntary Disappearances (E/CN.4/1990/13, para. 345, E/CN.4/1992/18, para. 367, E/CN.4/1993/25, paras. 514 and 520); draft Declaration on the Independence and Impartiality of the Judiciary, art. 5; Universal Declaration on the Independence of Justice, art. 2.6; etc.).

9. It is of interest, in this connection, to note the "theory of appearances" formulated by the European Court of Human Rights in connection with the implementation of article 6, paragraph 1, of the European Convention. According to the Court, certain appearances, even if they do not correspond to the facts, may create a legitimate doubt about the independence and impartiality of a court in the eyes of those brought before it. In the Borgers ruling of 30 October 1991 (series A, No. 214), the European Court concluded that article 6 had been violated, having regard to the requirements of the rights of defence and of equality of conditions as well as to the part played by appearances in the appraisal of their observance.

10. The situation of military courts must be evaluated in a similar light; there is a high risk of an appearance of partiality and dependence. This is less so in instances of purely disciplinary offences; in that case, the competence of military courts is perceived as legitimate by the parties and the general public alike. For charges in other categories, only the ordinary courts are capable of dispelling any ambiguity. For delicate military matters, ordinary judges and the parties can always consult officers as experts.

Confessions exacted under torture

11. Saavedra Marreros claims to have been tortured and forced to admit to being an activist in a revolutionary movement. The Rapporteur on torture has stated, in the report already mentioned (E/CN.4/1990/17, para. 120), that a medical commission, consisting of the Dean of the Medical Association, and a number of doctors and parliamentarians, did note that there were contusions on the prisoner's body and that his wrists showed signs of having been bound. The Group nevertheless felt that it was not appropriate for it to pronounce on a matter which had already been dealt with by another organ of the Commission. The fact of withholding action in favour of the Special Rapporteur runs counter to the explanations provided by the Group itself about its mandate (E/CN.4/1993/24, paras. 6 and 7). This body is supposed to collaborate with rapporteurs of the Commission and Sub-Commission and with treaty monitoring

bodies. Such collaboration should take the form, inter alia, of the exchange of information for the sake of coordination, the saving of time and resources, and the following-up of all information.

12. Moreover, the Group, in deciding that it is unwilling to pronounce on probable acts of torture inflicted on Saavedra Marreros when the very documents provided by the Special Rapporteur raised the suspicion of an affirmative response, introduces a serious contradiction into its own reasoning concerning confessions reported to have been obtained under torture. This body affirms that "there is no evidence to justify a finding by the Working Group that this allegation has been proved" (E/CN.4/1993/24, annex I, para. 6 (k)). This overlooks the view of the medical commission.

Some general observations on the activity of the Working Group

13. Concerning the notion of arbitrary detention, the Group distinguishes between a serious, or particularly serious, violation of the principle of fair trial and the violation of just some of the rights which constitute that principle. In the first case, detention is arbitrary in itself. In the second, the mere violation of the prerogatives which form part of the notion of a fair trial, including instances when they lack essential scope, may suffice to conclude that there is a violation of the right to a fair trial without, however, concluding that the detention is of an arbitrary character (cf. E/CN.4/1992/20, para. 23 (f) and E/CN.4/1993/24, p. 21). This reasoning is dangerous and threatens the soundness and foreseeability of the right, because of the subjective nature of the criterion of distinction (the seriousness of the violation). International standards relating to the right to a fair trial make no such distinction. The Human Rights Committee, in its General Comment 13 [21] on judicial safeguards, establishes no hierarchy of intensity of violation but, on the contrary, recalls that there are minimum rights whose observance must be ensured at all times.

14. In conclusion, the mere violation of even one of the rules of fair trial renders detention arbitrary. The very fact of making a distinction and thus creating degrees of importance for the various universally guaranteed fundamental rights constitutes, in itself, a rich source of arbitrariness. The American Association of Jurists feels that there are no grounds for such a distinction.

15. All the resolutions adopted by the Group are described as "decisions". The American Association of Jurists believes that this formula is not the most suitable. The Group's opinions have no binding legal force; it can only "request [States] to take the necessary steps to remedy the situation". It is up to the good will of the Government concerned to respect such a request or not. If the Group uses terms such as "decide" or "declare", which correspond not to its mandate but rather to a jurisdictional mandate, it risks giving rise to serious confusion. If, for example, the victim of a detention which the Group has "decided" or "declared" not to be arbitrary wishes to institute proceedings before the Human Rights Committee or the Inter-American or European Commission of Human Rights, might it not be considered, albeit wrongly, that the matter has already been "judged"? In order to avoid creating unfortunate confusion, the Group should use terms of a more neutral nature, such as "opinions" or "views", and confine itself to "considering" or "believing" that a detention is or is not arbitrary.